The Attorney General of Texas

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Open Records Decision No. 309

Re: Whether a financial statement submitted by a bidder seeking a state contract is public under the Open Records Act

Dear Mr. Goode:

An unsuccessful bidder on a departmental construction project has asked for a copy of the financial statement and equipment-and-experience questionnaire that were submitted to the department by the contractor to whom the contract was let. You ask whether you must comply with this request. You contend that this material is within sections 3(a)(1), 3(a)(4), 3(a)(7), and/or 3(a)(10) of the Open Records Act, article 6252-17a, V.T.C.S.

Section 3(a)(10) excepts from required public disclosure:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The material in question is clearly "commercial or financial information obtained from a person." To fall within section 3(a)(10), however, it must also be "privileged or confidential by statute or judicial decision." (Emphasis added). We must determine whether this requirement is met here.

Section 3(a)(10) is patterned after section 552(b)(4) of the Federal Freedom of Information Act, 5 U.S.C. section 552(b)(4). Open Records Decision No. 107 (1974). The leading federal case of National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), sets forth the following test for determining whether commercial or financial information is "privileged or confidential" within the meaning of section 552(b)(4):

> commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the

> following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Prior Open Records Decisions have held that information may be withheld from public disclosure under section 3(a)(10) if either of the National Parks standards is met. See, e.g., Open Records Decision Nos. 292 (1981); 256 (1980); 107 (1975). Without saying so explicitly, these decisions have in effect concluded that National Parks is a "judicial decision" within the meaning of section 3(a)(10).

This conclusion is bolstered by the recent decision in Apodaca v. Montes, 606 S.W.2d 734 (Tex. Civ. App. - El Paso 1980, no writ). There, the appellant explicitly based his argument that he was entitled to withhold certain financial information under section 3(a)(10) upon the National Parks case. The court responded to appellant's argument by stating that:

> While Appellant contends the disclosure will harm his competitive position, the trial Court did not make such a finding. In order to obtain the relief sought, the burden was on Appellant to obtain findings which would support his claim of an exception under the statute. There being no express findings of fact on this issue, it may be assumed the trial Court did not make any findings contrary to its judgment. In this case, we assume the trial Court failed to find 'substantial harm' to Appellant's 'competitive position' and we cannot say that such requirements were established as a matter of law. (Emphasis added).

606 S.W.2d at 736.

Significantly, the court did not reject appellant's argument that it is appropriate to use the National Parks test in determining whether information may be excepted under section 3(a)(10). By failing to do so, the court, in our opinion, impliedly sanctioned that argument. Clearly, it left the door open for trial courts to apply that test and determine that the disclosure of particular information may not be compelled because its release would cause "substantial harm" to the submitter's competitive position.

At this point, it is appropriate to observe that the National Parks test is, in our opinion, still viable, at least for our purposes. It is true that the United States Supreme Court observed in Chrysler Corporation v. Brown, Secretary of Defense, 441 U.S. 281

(1979), that section 552(b)(4) of the FOIA exists for the benefit of agencies, and that:

> the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

441 U.S. at 293. In this instance, however, you fully endorse the contractor's interest in confidentiality, inasmuch as you contend that the release of the material in question would harm your interests as well as his. Moreover, we note that the validity of the National Parks test was reaffirmed in Gulf and Western Industries v. United States, 615 F.2d 527 (D.C. Cir. 1979), which was decided after Chrysler Corporation.

We must now decide how National Parks applies in this instance. In Gulf and Western, supra, at 530, the court pointed out that:

> In order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added).

Accord, National Parks and Conservation Association v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976). The information at issue in Gulf and Western consisted of unexpunged documents which revealed the profit rate, actual loss data, and general and administrative expense rates of Norris Industries, Inc. With respect to the likely effect of the release of this material, the court stated that:

> Norris' competitors would be able to accurately calculate Norris' future bids and its pricing structure from the withheld information. The deleted information, if released, would likely cause substantial harm to Norris' competitive position in that it would allow competitors to estimate, and undercut, its bids.

It concluded that:

> This type of information has been held not to be of the type normally released to the public and the type that would cause substantial competitive harm if released. [Citations omitted].

615 F.2d at 530.

As noted, the material at issue here consists of the financial, equipment and experience statements that were filed by the successful bidder on a departmental contract. Such statements are required from all bidders on highway construction projects pursuant to Rule No. 101.06.00.001 of the Department's Construction Division Practice and Regulations, which specifies that certain financial information must be submitted by contractors as part of a "confidential questionnaire" in order to pre-qualify them as bidders.

You advise that you have determined that the release of the contractor's financial statement, which contains detailed data pertaining to his assets, liabilities, and financial resources, would likely cause substantial harm to the contractor's competitive position. You assert that this would, in turn, harm the department, because potential bidders will likely decline to bid on future projects if they know that information regarding their financial affairs will, in the hands of the department, be subject to public disclosure.

We believe you have made a reasonable determination with respect to the likelihood of "substantial harm." If this information is released, the contractor's competitors could ascertain his financial strengths, weaknesses, and capabilities, and use this information to undercut him in future competitive situations. This was the precise reason why, relying on National Parks, the Gulf and Western court concluded that the financial information at issue there could be withheld under section 552(b)(4). We therefore conclude that you may withhold this financial statement under section 3(a)(10).

The contractor's equipment-and-experience questionnaire presents a different question. Based on the evidence before us, we cannot conclude that the release of this questionnaire would likely cause substantial harm to the contractor's competitive position or impair the department's ability to acquire needed information in the future. This questionnaire does not contain data relating to the contractor's financial affairs which, in our opinion, would likely give a competitor an unfair advantage in future competitive situations; instead, it merely indicates the contractor's previous experience and performance capabilities. We therefore conclude that it is not excepted from disclosure under section 3(a)(10).

Neither is the questionnaire excepted under sections 3(a)(4) or 3(a)(7) of the Open Records Act. Section 3(a)(4) excepts "information which, if released, would give advantage to competitors or bidders." In order for this section to apply, there must be a showing of actual or potential harm in a particular competitive situation. See Open Records Decision Nos. 233 (1980); 222 (1979); 203, 184 (1978). We have no such situation here.

Section 3(a)(7) pertains to:

> matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure.

At the time of your request for our decision, a tort action was pending in 216th Judicial District Court. Certain documents at issue here were the subject of a protective order issued by a district court in that suit. The suit, however, was subsequently dismissed. Accordingly, we believe the protective order can no longer serve to bring this information within the portion of section 3(a)(7) which excepts information which, by court order, is prohibited from disclosure.

The contractor's equipment-and-experience questionnaire is therefore not excepted from disclosure under sections 3(a)(1), 3(a)(4), 3(a)(7), or 3(a)(10).

Very truly yours,

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